Date: October 26, 1998
Case No.: 1998-LHC-624
OWCP No.: 10-36515

In the Matter of:
James E. Huff
Claimant
vs.

Mike Fink Restaurant
(Bensons, Inc. - Mike Fink)
Employer

and

Director, Office of Workers' Compensation Programs
Party-in-Interest

Appearances:
Steven C. Schletker, Esquire
Mary E. Ray, Esquire
Schletker, Hornbeck & Moore
For the Claimant

Todd Powers, Esquire
Schroeder, Maundrell, Barbiere & Powers
For the Employer/Carrier

Before: **THOMAS F. PHALEN, JR.**
Administrative Law Judge

DECISION AND ORDER ASSERTING JURISDICTION

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq**.), herein referred to as the "Act," filed by James E. Huff , Claimant, against Mike Fink Restaurant, Employer and the Director of Workers' Compensation Programs, (OWCP), Party-in-Interest. The hearing was held on June 19, 1998, in Cincinnati, Ohio, pursuant to a notice dated April 17, 1998, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs

were requested and have been made a part of the record herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX/RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Issues

The parties stipulate, and I so find**:**

The sole issue in this proceeding is jurisdiction under the Act; namely, whether the Act applies to the Claimants's application for benefits. More particularly, the primary issue involves the question of whether the Claimant has "status" as an employee entitled to benefits under Section 2 of the Act, or whether he is within the "recreational" employee/ "restaurant" exception as set forth in Section 2(3)(B), and, therefore, not entitled to such benefits.

All other issues are reserved, as there are issues concerning the nature and extent of the injury, and whether the Claimant has reached his maximum medical improvement.

Stipulations

Otherwise, the parties also stipulate, and I so find:

1. Claimant and the Employer were in an employee-employer relationship at the relevant times.

2. The accident/injury arose out of and in the scope of his employment.

3. The accident/injury occurred on March 16, 1997.

4. The employer was advised of or learned of the injury on March 16, 1997.

5. Claimant filed a claim for compensation (Form LS-203) on May 19, 1997

6. Claimant filed a timely notice of Claim.

7. Employer filed a timely Notice of Controversion (Form LS-207) on 7/14/97.

8. Claimant's average weekly wage at the time of the accident/injury was $500.00/week, and his . . . compensation rate was $333.33 per week.

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's symptoms of back, shoulder, hand and leg injuries from the March 16, 1994 injury, and that he filed timely claims for compensation.

Summary of the Evidence

The Claimant, James E. Huff was born on July 24, 1956, and had a high school education. (TR 28-29) He is now age 42.

Mike Fink Restaurant, Inc., the named Employer herein, employs employees at its establishment, which is a dockside or a floating restaurant, permanently located on the Kentucky bank of the Ohio River, in Covington, Kentucky, on a retired river vessel. (T-22) The Claimant was first employed on March 6, 1987 by Bensons, Inc., (T-29; CXA-3) the parent or holding company of Mike Fink Restaurant, Inc. He was originally hired by Bridgett Osborne, Personnel Manager for Benson's, and began work as a dock hand for that corporation. (T-29; CXA-3) He was assigned to BB Riverboat ("BB" herein) which was docked on the Ohio River between Madison and Garrard Avenues, Covington, Kentucky, and was assigned to work for Jerry Krebs, Chief Engineer. (CXA-3) The Mike Fink Restaurant was, and continues to be, also located on the Ohio river, about 300 yards from the BB location. (T-30) Claimant was transferred to the Mike Fink Restaurant on May 22, 1995, (CXA-14) and has continued his employment there through the present time. (TR 34 & 13) At the time of his transfer, BB Captain Allen Rizzo informed Claimant that, while he denied that he was retaining any supervisory control over him, during the transition of transferring the Claimant to the Mike Fink's, he wanted Mr. Huff to keep him informed about what he was doing, because:

> I wanted to make certain from a corporate standpoint, that Jim didn't go up there and waste his week ... If Jim wasn't able to stay busy up there at The Mike Fink's, then we may have done something different. (JX3-21-22)

He stated that this was only for the first week. (JX3-21-22)

In addition to the Application for Employment and Payroll Department records submitted by the Claimant showing that the parent corporation, Benson's, maintains the payroll records for all of the subsidiary corporations. (CXA-1-15, CXE & CX-F-1-3) Employer records also show that there is central control of those records by Benson's, with a specific account number established for the subsidiary business, i.e., "0245" for Mike Fink Restaurant. (EX-C) He testified that he was paid on Benson's checks. (T-34; CXF-1) In particular, a Kentucky Worker's Compensation check for another injury in September, 1995 (spider bites) shows the Employer's name to be "Benson's Inc.," "ElGreco," "Employer Number 1226" (IRS) and the Individual or Partnership Name to be "Mike Fink, Inc., Crockett'[s]", with one mailing address, "1226 Greenup Street, Covington, KY," one Workmen's Compensation Insurance Carrier, "AIK Self Insurance Fund," and one Policy Number for the enterprise, also "1226."

As a dock hand for BB, Claimant assisted vessels in and out of port during their cruising times, did some maintenance work and cleaned out engine rooms. (TR 31) BB had three large vessels that carried a lot of people, smaller vessels such as water taxis that carry paying passengers, tug boats such as the Shirley B, and the Mary B., with welders and cherry pickers on

them, and a self contained crane barge, also called a work flat. (Tr 32 & CT Ex H-5, H-9) &H-10). While employed at BB, Claimant performed work at the various companies owned by Mr. Ben Bernstein, (TR 33) the principal "owner" of Benson's, and its related companies, including the Mike Fink Restaurant, (T-33) and while later working for Mike Fink's, he testified that he continued to perform work for the other Bernstein companies. (TR 34) As an employee at BB he developed a skill working on welding and torches, including the pulling of propellers on, "almost every drydock between here and Jeffersonville," Indiana. (TR 35) (Administrative notice is taken of the fact that Jeffersonville, Indiana is located across the Ohio River from Louisville, Kentucky, a distance of about 100 miles from Covington, Kentucky.)

A BB letter signed by its Director of Operations, Allen B. Rizzo, dated March 6, 1995 shows that, as of that date and before his transfer to the payroll of Mike Fink Restaurant, the Claimant was working for BB as Dockmaster at the Mike Fink Restaurant. (CX B-1) It describes his duties as:

> maintaining the Mike Fink's facility and is also a vital member of our corporate Emergency Response team. . . . a group of skilled employees who can be beeped to come in to work at any time of the night or day in the event of an emergency. The team members answer calls from all of our floating restaurant operations, Mike Fink's, Crockett's in Newport [now, Sloppy Joe's], BB Riverboats in Covington, as well as other river companies in the interest of maintaining a safe Cincinnati harbor.

The letter goes on to describe the conditions under which he may be called. (CX B-1) People on the team as of June 14, (year marked out) are listed in another document. (CX E-1)

In May of 1995, Dink Shallow, the Harbor Master at Mike Fink Restaurant had passed away, and the Claimant requested the job. He assumed it on May 22, 1995, and was transferred to the Mike Fink's payroll at that time. (T-36) When he moved to the Mike Fink's in May, 1995, he was primarily in charge of the docks at the rear of the restaurant, but continued assignments that he had been assigned on other Benson docks and end enterprises, as well as on the emergency team. His duties included, "mostly safe and timely operation of moving in and out [from the Covington, Kentucky shore line] during high-water situations and bad weather situations. Just overall making sure the place didn't sink ... and that it didn't get hung up on the rocks ...." (TR 37)

The Claimant's testimony revealed that he continued to take orders from BB Captain, Allen Rizzo, and his superior, Allen Bernstein, the Chief officer of that company, both before and after his transfer to the Mike Fink Restaurant. (TR 37) He also testified that after the transfer, he was called to the BB Riverboat landing in emergencies, and on at least one occasion was called back to work on a hole in the wharf or holding area for that company. (TR 39) He also worked on other BB Riverboats such as the U.S. Nightmare, (haunted boat) the Shirley B. and the crane barge. (TR 40)

Following his transfer to the Mike Fink's as Harbor Master, Claimant was in charge of the docks attached to the back end of that vessel. (TR 41) As a supervisor, his job included dealing with the B B Riverboat that was tied up at the dock of Mike Fink's most of the time. (TR 41) He described the boat and dock area of the Mike Fink's as consisting of 160 foot of boat or restaurant and approximately 200 feet of dock space on the back of that. (TR 42) They are attached to the Mike Fink's and all move as one unit. (TR 42)

While reviewing the video tape of the Mike Fink Restaurant (CX I), Claimant described the "spud" at the Mike Fink's docks - the docks on the back of the Mike Fink's showing a Covington Police and Fire Rescue there. (TR 44) Also, docked at the Mike Fink's was a harbor tug out of Hatfield, and he testified there would be commercial harbor tugs tied up at the Mike Fink's dock "quite a few times". (Ibid)

Spuds are in place to hold the boat to the bottom of the river. (TR 44) They are like big pipes that go into the river bed. The spuds have holes in the sides where you can put pins through, in order to adjust the height of the boat to the river. (TR 46) The cherry pickers are used to "hold spuds" and deal with heavy things, including engines. (TR 46) He testified that there was a "welded spudwell" that is probably 3 or 4 inches smaller than the spud itself that slides down inside of the spud. The spudwell is welded to the vessel itself or to the docks, and this slides down inside to hold it in place. It goes up and down like a telescope and is pulled up and down with a "chain pull". (TR 52)

On the day of the accident, at approximately 2:30 in the morning on March 16, 1997, Claimant had just adjusted the "back spuds" on the stern of the Mike Fink Restaurant and climbed the platform at the other end to adjust them. This was on the bow or the front end of the Mike Fink's where there are three spuds. (TR 49) At the time of the injury, he was in the process of moving the whole structure, docks and restaurant. The temperature was six degrees with a wind chill factor of below zero. (TR 49) He fell backwards on the platform and pulled himself backwards towards the propane tanks looking a place to put his foot and ended up between four propane tanks and hit his head somewhere on the platform on the way down. He tried to catch himself and it knocked him out. (TR 48) When he fell, he landed between the propane tanks with his legs stuck in between them. The chain fell and ended up wrapped around him and across the small of his back. (TR 50) He was trying to get off the chain fall with one arm and it kept wrapping around him. As he struggled to get out of it, he realized the chain was just wrapping further so he stopped and waited for someone to come along. (TR 50) He remained there until 7:30 when an employee named "Don" came to work.

The docks that are attached to the Mike Fink's remain there year round. In the summertime, the docks are used for pleasure craft but there are certain times of the year, especially in October, November, December, January, February and March, when there are no pleasure boaters at all. (TR 53-54) The docks continue to be used as a "catch-all" by Benson's such as for the Shirley B, the crane barge, the Mary B and the Kon-Tiki or any barge that they wanted to move up throughout the year. Usually, the pleasure crafts that are there in the summer

come in and the operators eat and leave. Except for the time during the fireworks when the dock is packed, (TR 54), there are non-pleasure vessels that dock at the Mike Fink's throughout the year, such as the Mary B which was "pretty much" under his care. (TR 55) He would check it every day and make sure that there was no water in it and that it was secured. It was "hard rigged" to the back of the dock area. (TR 55) This meant that it was wired in and had wenches that could pull it up tight. This vessel was originally used as a garbage scow during the "Tall Stacks" week when riverboats from all over the country gather in Cincinnati for public display and events. It was later fixed up "really nice" as a single screw tug. (TR 56)

After the Mary B left, there was another commercial vessel that took its spot known as the Beverly Wayne. (TR 56; CXH-12) The Beverly Wayne is a two-screw tug that has a hard line for electric. He would move it whenever needed for high water, etc. and pull it closer to the end of the dock area for safety purposes. The Beverly Wayne had two working wenches on the front of it. (TR 60) The Claimant made it clear that anything parked on the Mike Fink's docks were his responsibility as Harbor Master. (TR 61) A man named Dave Hammond from Carlisle Riverboats, and a friend of the Bernstein's, owns it and keeps it running to keep his pipes from freezing up. Claimant's job would be to check and make sure it was not taking the water, that it was heated, and that it still had running water inside. He would check it out and come back out of it. (TR 61-62) During the time it was parked there, he also tried to use it to blow drift out from around the dock areas where a lot of debris which would catch onto it coming out of the Licking River. (Mike Fink's is the first facility down river from where the Ohio River and the Licking River join.) The Shirley B was actually a better vessel for that particular duty. (TR 63) On one occasion, the Claimant went with Mr. Hammond and picked up a barge flat. They brought it back to the Mike Fink's and tied it off. It was later picked up by one of Carlisle's boats. (TR 63) The Beverly Wayne was also used to move another scary boat called the "William _____," when the Shirley B was just too small to handle it. (TR 63)

In his cross examination, Claimant verified that there was a pleasure boat on the back of the Beverly Wayne with a satellite TV, stereos, refrigerators, stoves (TR 84) and that it was an unique tug boat in which the owner may have lived on every day for periods of time. (TR 85) He also testified that he was never told of the arrangements between Mike Fink's and the Beverly Wayne, just that it was coming and to accommodate him from Mr. Allen Bernstein. (TR 85) When asked whether the boat was used just for Mike Fink's when it was used, Claimant testified that that was not correct, that B B Riverboats used it for various reasons. (TR 86).

The Claimant also testified that after he transferred to the Mike Fink's he did a lot of work with the Shirley B such as using it as a tug boat, and to "blow drift". (TR 64-65) He did bring supplies on to the Shirley B and the crane barge and equipment such as acetylene tanks and equipment, and gas would be brought on the Shirley B. (TR 65) Other non-pleasure, non-restaurant craft would park at the docks while he was Harbor Master, and in some locations, did work on the dock itself. At times, he would repair the docks of the Mike Fink's, would take sheet metal off the Shirley B or crane flats, and if another welder was not available, would grind the spot off and get it ready for the welders. (TR 66) On occasions, he would even do the welding

himself. He added additional dock space to the Mike Fink's dock, and even took another flat the size of the Beverly Wayne and put it into place on the back of the dock. (TR 66) Claimant testified that he spent 90 percent of his time outside, either on the docks or outside on the vessel (Mike Fink's) somewhere. (TR 66-68) He was also called over to the B B Riverboat to do painting and "things of that nature", would help the crane barge "get tooled up or supplied up" if they needed him to come over there he would help them with whatever they were doing to "get up there faster". In response to a question of whether there was a separation between the companies that Mike Fink's workers only worked on Mike Fink's stuff and B B Riverboats workers only worked on B B Riverboats, he responded "No". (TR 68) On one occasion, Allen Rizzo called him to tell him that painters had not showed up, and he was to take the painter's position and do work there when a boat was down. (TR 69) He was also called by B B Riverboat to assist at Crockett's since June, 1995, to deal with a tarp that had blown off, and went to Hooter's (another floating restaurant on the river) as part of the Emergency Response Team with the crane flat and the Shirley B. (TR 70) When the City of Cincinnati's dock got loose (TR 70), he was with Captain Willhoite, the B B Riverboat captain, when they had to call for additional help from the Shirley B when barges got away. (TR 71) He testified that sometimes the crane barge which was attached to the Shirley B, would be parked at Mike Fink's when the Shirley B was gone, and stay there for days on many occasions. (TR 72) When the crane barge or the Shirley B was kept at Mike Fink's, his duty was to make sure that it was secured to the docks; that the pumps were working on it, and that it had an overboard discharge on the inside. (TR 72) When it rains hard, it fills up like a swimming pool. (TR 72)

On cross examination, when asked by the employer's attorney, who his employer was, Claimant testified that he believed it to be "Bensons, Inc." based on the fact that he was taking mostly his marine orders from B B Riverboat's Allen Rizzo. (TR 74)

The Claimant testified that he also took orders from the general manager, Tim Shaughnessy, of the Mike Fink's. (TR 74) In his cross examination, Claimant verified that various employee actions such as vacations, signing his W-2 form, etc. were signed by Mike Fink's representatives, and the W-2 form showed Mike Fink's address. He verified that after his transfer to the Mike Fink's, he was not involved with building any more boats such as he was with the Mary B before he transferred. (TR 79) He also verified that after his transfer his vast majority of duties were with Mike Fink's. He also verified that when he would get on the crane barge to work on the Mike Fink's, the majority of the time the work would be performed on the Mike Fink's. Also, the crane barge from B B Riverboats is used for general maintenance around the Mike Fink's. (TR 80)

Captain Allen Rizzo, now general manager at B B Riverboats, also testified at the request of the Claimant, that B B Riverboat had a full time welding staff during the period from 1995 to 1997 that went out on the Shirley B, and at times, the Shirley B and the crane barge would dock at Mike Fink's during that time period. (TR 90-91) They did work for companies other than Bensons, Inc. including Riverside Marina (not certain), BP Oil, Hooter's, and City of Cincinnati docks. (TR 91)

In a deposition dated June 11, 1998, Captain Greg Willhoite of B B Riverboats, testified that besides operating the Shirley B and the crane barge, he has other duties including being in charge of the welders and maintenance of the boats. (T 5) He confirmed that they would do work for all of the Bernstein's places such as Mike Fink's, the docks of Mike Fink's, Crockett's, Sloppy Joe's, etc. and they would hire out for companies such as BP Oil, Cincinnati Recreation Commission's docks, and Hooter's and Barleycorns once in awhile, and that they would do welding, fix docks, and do whatever was needed on the river. (T 5-7) He verified that James Huff worked for B B Riverboats originally, and that he performed certain duties for them once in awhile. He was mainly in charge of deckhands doing environmental painting and keeping the place looking nice. (T 7-8) He acknowledged that Claimant became Harbor Master of Mike Fink's and after that while supervised by Tim Shaughnessy, the manager, did some work on the Shirley B and other vessels when they come to the docks of Mike Fink's. He insisted that the work was for Mike Fink Restaurant.

A contract employee, Mark Ihle of Mike Fink's during the flood of 1996, testified by deposition that he worked for three weeks during the flood and that other boats such as the Maryland K. McFarland and the training boat for the City of Cincinnati (a tug boat), and a crane barge for the B B Riverboat, Mary B from B B Riverboats, and the Shirley B, plus one of the paddle wheelers were docked during that time (JX 6, 8-9).[1] Other times he saw him pull steel off B B Riverboats when they "put it through the chop saw" and that he saw him pull welders off the crane barge. One day he helped him pull a welder off and towed it through the building (JX 6, 19). He also saw Claimant bring supplies to the crane barge such as oils, diesel fuels, parts and supplies, and do grinding on the barge. He verified that if any boat was tied to the dock, it was part of Huff's activities to be working with those pumps. When these other boats were parked there, it was Jim's duty to go and make sure their upkeep was in (i.e., making sure the pumps and everything were right and that they did not sink, including work vessels). (JX 6, 21) Based upon the lack of contradiction to it by Employer witnesses, I credit this deposition testimony.

David E. Bernstein (nickname: Allen) was called as a witness for the employer. He testified that he was a Benson's employee and set forth a corporate structure of Benson's and the other separate corporations as follows: Each companies is separately incorporated and covered by whatever legal or accounting purposes. There is a parent company called Bensons, Inc., (T 96) and Benson's is "Ben" who was my father, and his "sons", my brother Jim and myself." He testified that there are other companies under the "Benson's" umbrella: Mike Fink's, B B Riverboats, Crockett's now Sloppy Joe's, and two or three Chuck E Cheese's in the state of Kentucky. (T 97) He testified that El Greckos which is no longer in existence was one of the Benson's corporations still appears on the Form W-2.

On cross examination, Mr. Bernstein confirmed that he, his mother and brother, Jim (James) were involved in the business of Benson's, Inc. This included subsidiary companies for

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[1] The June 11, 1998 Mark Ihle Deposition Transcript citations are referred to as "(JX6, ___)."

which he is vice president of Benson's, B B Riverboats and Mike Fink's. His brother Jim is the president of B B Riverboats, Benson's, and Mike Fink's. His mother holds the position of secretary for those companies. He confirmed that the employees of B B Riverboats, Mike Fink's and Benson's are paid by Bensons, Inc. for accounting purposes with the checks coming from the corporate office called Benson's, but each has a code or a name on which the check is drawn (Tr 104-105), and that the expenses are charged to each of those companies.

In a deposition of Mr. Bernstein taken on August 18, 1997 (JX2, 1-73), he testified that he and his brother are the sole stockholders of Benson's and Mike Fink's (JX 2, 6-7) and that his mother is secretary and Rob Hauglin as the financial officer of both corporations. As Jim Bernstein is the president of those companies, Allen is the vice president and, Mrs. Bernstein in the secretary. (JX 2, 7) This would be the same for Crockett's (now Sloppy Joe's). (JX 2, 7) He confirmed that Benson's does the payroll and accounting work for the entities. (JX 2, 8) He testified that the way the computer is set up all the checks that are cut are coded to the company and are issued on Bensons Inc. checks, but each company has its own payroll. (JX 2, 10) Mr. Bernstein confirmed that technically the ultimate ownership of all the vessels may go back to Bensons, Inc. (JX 2, 13)

Mr. Bernstein testified that Tim Shaughnessy was the direct supervisor and general manager for Claimant from the time of his transfer to Mike Fink's. (T 98-99) He testified that Claimant would be responsible for maintenance including light bulbs, cleaning the down stairs space, certainly responsible for checking around the vessel, and cleanliness in the parking lot. He testified that he did not recall him spending numerous days working at other corporations or ever being on the other corporation's payroll. He testified that with regard to the Shirley B, Mary B, and other B B Riverboats that were at Mike Fink's, they would occasionally be in their way at B B, and they would move them to Mike Fink's, but not leave them there on a regular or sustained basis. He testified that they do move equipment, "up there and back on a fairly regular basis, but it's temporary and it's simply to get it out of our way or for some reason that we need it out of the way down at B B . . . ." (T 100) The crane barge of the Shirley B would be moved to the Mike Fink's for the Mike Fink's maintenance and upkeep, and, at such times, Mr. Huff would be required to board the crane barge in order to perform his duties for Mike Fink's. (T 100) He testified that the Mike Fink's docks are secured by wiring and are there for the convenience of the patrons (T 101), but confirmed that the Beverly Wayne was moored for a period of time and that he was unaware of any consideration paid to Fink or any of the Benson's for that arrangement. It apparently being on a friendly basis. (T 101) In exchange, he would let the Benson's use the boat periodically and also would use it in an emergency as described by Mr. Huff. (T 102) He did confirm that the Covington Police and other government agency vessels to more at Mike Fink's docks since he is very active with emergency groups along the Ohio River and this is done as a courtesy. (T 102) This allows them to respond to an emergency, to come down and get into their boats and respond quickly. He does this as a courtesy to the citizens. (T 103) At the time of the his injury in 1995 (mistakenly asked as March, 1997), Claimant was carried as a Mike Fink's employee for Kentucky Workers Compensation coverage. (T 103)

In Mr. Bernstein's testimony he also confirmed that Mr. Huff does maintenance work as part of his job including maintenance work on the docks at Mike Fink's and that any repair work to be done, any kind of maintaining would fall under his job description. (T 105) He then stated that the job of changing tires, carpet, etc. was a minimal part of Jim's job, not the vast majority. (T 105) He confirmed that the Shirley B, the crane barge, and the Mary B would often dock at the Fink's docks, and that at those times Mr. Huff would be responsible for checking on them, making sure they did not sink, and that they were tied off properly. (T 106) That was also the same for the Covington Police boats or any other boats that would be tied on the dock. (T 106) He also confirmed that there had been occasions that B B Riverboats or Sloppy Joe's that Mr. Huff would be called down to assist "on a rare occasion or two" and that he did not know the number of times, personally. (T 106) He confirmed that he did not work with him on a daily basis and that there might be other times that he went to do that work. (T 107)

In his deposition, Mr. Bernstein also confirmed that B B Riverboats owns the Cincinnati/Covington Funliner, the Mark Twain, the Huck Finn, the Blue Grass, the Buckeye, barges, docks and flats. The Covington Funliner, the Mark Twain and that grouping, move passengers. (JX 2, 19-20) The Blue Grass and the Buckeye is a "little shuttle boat", also for excursions to the Reds games, etc. (JX 2, 20) The barges or flats involve the location of their B B facility which is on a series of barges on the wharfs. (JX 2, 20) In addition, B B has a crane flat (barge) which contains a mobile crane or cherrypicker. (JX 2, 21) It also has welding machines and other equipment used for BP Oil to put some wood on their existing dock and work on the city dock. (JX 2, 22) These are charged for this work. (JX 2, 22-23) They have also done work for Hooter's when their "spuds" are hung up (JX 2, 24) and for C. G. & E. involving concrete on the river on an underwater cable line. (JX 2, 25) They have done work for Carlisle (JX 2, 25) and, of course, work on the Mike Fink's (JX 2, 26), where they would keep track internally of work when someone was sent there. (JX 2, 26-27) Mr. Bernstein testified that there are no records that would show how much the Shirley B and other work boats or tow boats, and the Mary B (little work boat) do at those sites. (JX 2, 33-34) The Beverly Wayne is parked there at the request of Griff Carlisle, another river crane and barge company, sometimes used by the Benson operations to life spuds and to move various equipment around when their boats can not flush drift. (JX 2, 36) While denying that Claimant had any duty at all on the boat, he did acknowledge that he was obligated to check moorings and lines, and that there are things expected of Jim for any vessel that "I would expect Jim for any vessel that was there to make sure it was secured or was not sinking or needed to be pumped out." (JX 2, 37) He acknowledged that the Beverly Wayne does not have anything to do with the restaurant or the business of Mike Fink's. (JX 2, 37) Mr. Bernstein also confirmed that Claimant does not perform any traditional restaurant activities such as cooking or serving, meals or bussing tables that he ever saw. (JX 1, 59) He also confirmed that longshore insurance coverage is maintained on some of the B B employees, and Kentucky Workmen's Compensation insurance is maintained on Mike Fink's employees.

The police and fire department have asked if they can keep their boat in the water for the summer at the Mike Fink's dock and they normally let them dock it there. They park their truck and run down into the boat when attend to a pending disaster, and "etc." (JX 2, 38) No dock fee is paid for that service. (JX 2, 38) Once again part of Claimant's duties would be to look at the moorings, pumps and whatever needed to be done at the vessel on the dock. (JX 2, 38-39) Besides the fire boat, there would be a police boat and occasionally a county boat that as part of the Claimant's duties would be to check the moorings and pumps to make sure that it was afloat. (JX 2, 39) Mr. Bernstein also confirmed that occasionally Claimant would help out cleaning and maintenance and so forth on the crane barge and the Shirley B. (JX 2, 40-41)

When asked if jobs required more than Claimant taking care of docks, walkways and ramps, and if B B Riverboat workers would come to assist, Mr. Bernstein stated that they would. (JX 2, 53) Mr. Bernstein denied that Claimant was still part of the response team when he moved over to Mike Fink's, but confirmed that they may have called him over to B B. (JX 2, 55) He generally described Claimant's job as a maintenance worker at the restaurant, doing things that would be necessary to get the restaurant in operation, keep it looking nice, make it presentable, but that he would also handle the walkways, docks, spuds and the positioning of the when it was necessary. (JX 2, 56) He also confirmed that typically Claimant would call and ask for other people to come up and help him [from B B] with particular problems he was having. (JX 2, 57)

Finally, Mr. Bernstein confirmed that he did not work with Mr. Huff on a daily basis; in an average 8 hour day he would spend very little time with Jim Huff. (JX 2, 70-71) He also denied that the Claimant had regular and recurrent duties that involved building repairing and loading or unloading vessels. (JX 2, 72)

Allen Rizzo testified that he was general manager at B B Riverboats. (JX 3, 5) He has a 100 ton master's license. (JX 3, 5) Since 1990, he has operated the Becky Thatcher of Cincinnati and the Covington Funliner, both passenger boats involving site seeing charters, lunches and dinners. (JX 3, 6) Also includes the Mark Twain and since 1995, the River Queen. The Becky Thatcher has now been sold. They also have three small excursion ferry boats, the Blue Grass, the Buckeye and the Huck Finn. (JX 3, 7) Captain Rizzo denied that they maintained any records or log books on the work that had been performed by the Shirley B and the crane barge on various other locations such as BP Oil, the Cincinnati School Boat (the McFarland), the Cincinnati Gas & Electric, etc. (JX 3, 12-15) There might be invoices "someplace." He stated that the amount of time in the past five years that they worked for "other people" is "nominal". He did confirm that over the past six or seven years they had performed tasks for Covington Landing (removal of a refrigerator for "Howl at the Moon' when it was being shut down) (JX 3, 18) and they did other work for their own operation such as the U.S. S. Nightmare to set the boat in place and remove it because it has spuds. (JX 3, 19)

When asked whether he was employed by B B Riverboats or Bensons, Inc., he responded, "That's a good questions - my check is a Benson's check, but I am general manager of

B B Riverboats, so - - I consider myself a Benson's employee," then, "I don't know, only because I get a Benson's check." His W-2 form, however, has the B B Riverboat's federal ID number. (JX 3, 20) He was Claimant's supervisor when he was working for the B B Riverboat division. (JX 3, 21)

With regard Tim Shaughnessy's river background, Mr. Rizzo testified that he did not know of any. (JX 3, 23) Captain Rizzo denied that after the Claimant's transfer to the Mike Fink's, he had any supervisory authority over him. (JX 3, 23-24)

Mr. Rizzo testified that he could only recall two or three occasions when he got involved on behalf of B B with Mike Fink's operations. One was with the Mike Fink's kitchen repair, helping get the equipment out and taking out the old floor. Then twice, when the Mike Fink's had a leak and they needed to repair the leak to stop it. (JX 3, 27) He also noted that he would go there for lunch and on one occasion he walked around talking to the painters and how the painter was "preparing his field." (JX 3, 28)

As an example of the time when Captain Rizzo acted in a way he that he felt was not supervisory, he discussed the following incident:

> Jim was driving around in our company truck with a 55-gallon drum of docile fuel in the back of it. I told him it was something that had to stop; but that was a matter of common sense, not of a supervisory role. When he didn't take care of it, Jim Bernstein handled that as Mike Fink's manager. (JX 3, 3 2)

He acknowledged that the Shirley B or the crane barge would have been docked at the Mike Fink's facility during some high waters, less now than before 1987, because of their new location at Covington Landing. However, if they could not land there, they would go to Mike Fink's as a "temporary condition." (JX 3, 32)

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant/witness, and the other witnesses in this case, I make the following:

Findings of Fact and Conclusions of Law

1. Basic Governing Principles of Law:

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968), reh. denied, 391 U.S. 929 (1969); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Scott v. Tug Mate, Incorporated, 22 BRBS 164, 165, 167 (1989); Hite v. Dresser Guiberson Pumping, 22 BRBS 87,

91 (1989); Anderson v. Todd Shipyard Corp., 22 BRBS 20, 22 (1989); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Seaman v. Jacksonville Shipyard, Inc., 14 BRBS 148.9 (1981); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir. 1969), cert. denied, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. Durrah v. WMATA, 760 F.2d 320 (D.C. Cir. 1985); Champion v. S & M Traylor Brothers, 690 F.2d 285 (D.C. Cir. 1982); Harrison v. Potomac Electric Power Company, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); Anderson v. Todd Shipyards, supra, at 21; Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that a "**prima facie**" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/ Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), rev'g, Riley v. U.S. Industries/ Federal Sheet Metal, Inc., 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his or her body. Preziosi v. Controlled Industries, 22 BRBS 468, 470 (1989); Brown v. Pacific Dry Dock Industries, 22 BRBS 284, 285 (1989); Trask v. Lockheed Shipbuilding and Construction Company, 17 BRBS 56, 59 (1985); Kelaita v. Triple A. Machine Shop, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita, supra; Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present

substantial evidence proving the absence of or severing the connection between such harm and covered employment or working conditions. Kier, supra; Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

2. The Positions of the Parties:

In the present matter, Claimant alleges that the harm to his bodily frame, i.e., the effects of a fall from a mooring spud on a stationary dockside restaurant while performing the tasks of his employment, entitle him to benefits under the Act. The Employer has introduced no independent evidence severing the connection between such harm and Claimant's employment at this time, but has addressed questions to the Claimant concerning the issue of whether his employment constitutes maritime/longshore employment, within the "restaurant" exception in subsection (B), to § 2(3) of the Act, 33 U.S.C. § 902(3)(B). Thus, while Claimant has apparently established a **prima facie** claim that such harm is a work-related injury, no evidence has been presented on the nature and extent of the injury, or otherwise on the Claimant's entitlement to benefits, and those issues are preserved, pending a ruling on the status of the claimant as a covered employee under the Act.

3. The Original "Employee" provisions - Pre-1984 Amendments:

Prior to the 1984 amendments, Section 2(3) of the Act, 33 U.S.C § 902(3), simply defined an "employee" for coverage purposes as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship- breaker ....

The United States Supreme Court has interpreted this language to mean that to be eligible for compensation under the Act, a person must be an "employee" as defined in the Act, who sustained an injury on the situs defined in the Act. P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed. 2d 225 (1979). The Employer has confirmed that the Claimant was injured over navigable waters, thus meeting the "situs" test, but contests the Claimant's status as a

covered "employee" under the provisions of the Act. It contends that Claimant is not a "maritime" employee, citing Pittman Mechanical Contractors, Inc. v. Director, 35 F.3d 122 (4th Cir. 1994), wherein a plumber injured on a pier was found to have such required "maritime" status, consistent with Director, OWCP v. Perini North River Associates, 459 U.S. 297, 103 S. Ct. 634, 74 L.Ed. 465 (1983). While Pittman does confirm that pier or dock workers are covered employees in an appropriate maritime or labor worker situation, the employer contends that Claimant Huff's alleged maritime status in the present case was obviated by the 1984 amendment to Section 2(3)(B), which excludes "restaurant" employees. It should be noted, however, Pittman also affirmed the principle that the Act's provision specifying covered employment is to be liberally construed to favor coverage. (Id. at 126)[2]

In an initial case involving this same restaurant, Antionette Ceferatti v. Mike Fink, Incorporated, et al, 385 F2d. 309, 17 BRBS 95, 1986 WL 16435 (1986) (Unpublished.)[3] a "salad girl" employee who was leaving the boat via its gangplank, fell through a gap to the rocks beneath it, suffering injuries for which she submitted an application for benefits shortly thereafter. Her injury occurred on April 10, 1979, preceding the 1984 amendments which will be discussed *infra*. Applying the United States Supreme Court decision in Director, OWCP v. Perini North River Associates, supra, the Administrative Law Judge held that the claimant was an eligible "employee" entitled to benefits. Perini held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he is, "engaged in maritime employment" and therefore is a covered employee under Section 2(3). Rejecting an argument that the Administrative Law Judge had misconstrued Perini, and that, "a worker injured on navigable waters is not a covered "employee" if the worker's duties do not constitute traditional maritime activities," as was the case with such a restaurant employee, the Sixth Circuit ruled that, "a worker's occupational status is not generally relevant when the injury occurred in actual navigable

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[2] The Employer's citation to Herbs Welding v. Gray, 470 U.S. 414, 105 S.Ct. 1421, 84 L. Ed. 2d 406 (1985), is not helpful in the present case, as that 5-4 decision acknowledges the application of Perini to dock and pier employees under ordinary navigible waters/maritime employment. That case evaluated competing concepts of employment of a welder on a stationary offshore oil drilling platform and his coverage under the Continental Shore Funds Act, 43 U.S.C. § 1331, the Louisiana State Workmen's Compensation Act and the present Act. It chose non-coverage under the present Act for a variety of reasons, finding that the platform was not capable of floating. (See dissent, 470 U.S. at fn 1.) The four dissentents vehemently contested the majority determination.

[3]Although the Sixth Circuit's decision falls within that Court's Rule 24(c) governing unpublished decisions, the decision was discussed during the hearing to determine whether there was any effect on the present matter from the Sixth Circuit's determination. The effect of intervening legislation on that determination is discussed at length in this decision and order.

waters, as in this case." The court thus affirmed the Administrative Law Judge's opinion that the Claimant was a covered employee entitled to benefits under the Act.[4]

The 1984 Amendments

A. Employment by Mike Fink Restaurant as a Sole Employer:

(1) Amendments and Case Law Interpreting the 1984 Amendments:

Responding to determinations such as that providing benefits to Mike Fink's salad employee as set forth above, in 1984 Congress adopted several exclusionary amendments to Section 2(3) of the Act, which limited the scope of its covered "employee" definition. To do so, it provided several exceptions to the above definition of the term, in particular in subsection (B) which excluded:

> individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet. (Pub. L. 98-426, 33 U.S.C § 902(3)(B) (1984). (Emphasis added.)[5]

These amendments have been incorporated into the Code of Federal Regulations at 20 C.F.R. § 701.301(a)(12)(i)-(iii).

At the end of its Mike Fink decision supra, the Sixth Circuit specifically acknowledged the 1984 Amendments that had been adopted in the interim since the filing of the claim, and what it

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[4]In 1989, the Court again punctuated the breadth of "maritime employment" coverage of the Act when it stated that it includes not only specified occupations or employees who physically handle cargo, but also land-based activity occurring within a relevant situs if it is an integral or essential part of loading or unloading of a vessel, and therefore an employee who is injured while maintaining or repairing equipment essential to loading or unloading process is covered by the Act. Chesapeake and Ohio Ry. Co. V. Schwalb, 493 U.S. 40, 110 S.Ct. 381 (1989)

[5] In addition, § 2(3) excluded: A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; and C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance); D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter; E) aquaculture workers; F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length; G) a master or member of a crew of any vessel; or H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses A) through F) are subject to coverage under a State workers' compensation law.

characterized as the "illogical results" that had flowed from the Perini decision in that case, of which the original Mike Fink - salad worker decision was but one. The court characterized the new 1984 amendments as excluding, "restaurant workers and other employees in similarly non-maritime occupations from coverage." 17 BRBS @ 98, (1986 WL @16435.) In so doing, however, the court cited the Statement of Senator Hatch in the legislative history that the amendments excluded, "activities and occupations [that] either lack a substantial nexus to maritime navigation and commerce or do not expose employees to the type of haxards normally associated with longshoring." Cong. Rec. S11622-23 (September 20, 1984).

As a result, unlike the salad worker in the first case, the question that must now be addressed in the present case is, whether a Claimant employed by the same Mike Fink Restaurant who was not only injured over navigable waters, but was allegedly engaged in the kind of hazardous longshore or maritime activity that the Act was originally meant to cover, must be denied such benefits due the apparent breadth of the new exclusion of "individuals employed by a ... restaurant ...."

There have been several reported decisions involving the § 2(3) exclusions. One involves the § 2(3)(A) clerical employee exclusion, which is referenced to demonstrate the difference in categories of excluded employees. This one utilizes the term "exclusively" in the amended language, excluding, "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." (Emphasis added - see footnote 4.) The language was interpreted to permit jurisdiction and coverage of an employee who actually performed longshore duties, along with his clerical duties since he was not performing clerical duties "exclusively" for his employer. Lenning v. Waterfront Transport, 20 F.3d 658 (5th Cir. 1994)

Three others involve riverboat casinos under the "recreation" exclusion of § 2(3)(B), and another involves its "club"/"camp" exclusion. In the casino cases, Arnest v Missippi Riverboat, Ltd., 29 BRBS 423 (ALJ) (1995) and Peters v. Roy Anderson Building Corp., 29 BRBS 437 (ALJ) (1995), aff'd, BRB No. 95-2098 (unpublished), the ownership of the employing entity was a key factor. In Arnest, the casino employed the employee who was working on a completed, attached, dockside casino, and was held to be excluded from coverage by Section 2(3)(B). In the other, Peters, it was held that if the injured person worked on a dockside casino merely helping to build or repair it, she would not fall under the exclusion if she was not employed by the recreational operation itself. Peters received benefits. Arnest did not.

Peters was employed by the general contractor as a laborer, building the Grand Casino in Biloxi, Mississippi. The work was in the casino itself, which was being constructed on barges, on the water. She sometimes worked on land projects. However, she was working with a clean up crew which was assisting in setting up tables, booths and chairs in the restaurant area of the casino. Peters was covered under Perini because she did not work for the casino, and was, therefore not subject to the exclusion of employees under § 2(3)(B).

In the third casino case, Segrave v. M. M. C. Mechanical Contractors, 29 BRBS 222 (ALJ) (1995), a lead plumber working on the drainage system for a parking lot at the future site of the Jubilee Casino in Mississippi was held to be clearly excluded from coverage under Section 3 of the Act. He was working 300 feet from the concrete pier where the casino was being built installing storm drains.

In Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998), the Fifth Circuit interpreted the "club"/"camp" exclusion of § 2(3)(B). Green worked at a duck camp operated by the employer under contract with a private club, and was on the vessel at the time of his injury. Other duties included the harvesting and selling of alligator eggs, trapping and selling alligators, fur trappping, shrimping and rice farming. He worked as both a cook and watchmen at the camp during the duck season, and the rest of the year performed general maintenance. He also cooked lunch meals for corporation employees bringing groceries with him and occasionally assisting in mooring and unloading supply boats that docked at the camp. But for the lease to the club, the corporation would not have conducted any of its operations from the site and would not have had any need for the Claimant's services. The Fifth Circuit held that Green, "was employed solely to render services to promote and maintain a duck camp and that he was excluded from benefits under Section 2(3)(B)." (Id. at 334)

In Green, the Court discussed the House document (H.R. Doc. No. 98-570, Part I, 9th Cong., 2nd Sess.), which stated "exclusions from the definition of employee contained in the amendments . . . are intended to be narrowly construed," and that paragraph (B) excludes such employees, "because of the nature of the employing enterprise, as opposed to the exclusions in paragraph [(A)] which are based in the nature of the work which the employee is performing." The Court stated that while businesses falling under paragraph B may have employees that should remain covered under the Act "because of the nature of the work which they do or the nature of the hazards to which they are exposed, . . . [w]e believe the opposite is true: clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities." (Id. at 335.) The Court held that Green's duties involved those of, "a cook, watchman and general repairman of the camp buildings. . . ." and not "an employee for which LHWCA benefits were intended." (Ibid)

The Court also went on to hold, however, that the Claimant was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel, and could pursue his unseaworthiness claim as well as his general maritime negligence claim against the employer! If followed to the letter in the present case, the present Claimant appears to be engaged in traditional maritime employment on a continuing basis but could not constitute an exception to Section 2(3)(B) due to the breadth of the restaurant employee exclusion.[6] The

[6] However, under this decision, other maritime legal action could be considered if the Mike Fink employment deprived him of benefits and there was no Kentucky State Workmens' Compensation coverage.

employer proposes that in the present case none of the Mike Fink's employees can be "employed under maritime employment" because all are excluded from the definition of the employee under § 2(3)(B), arguing that Claimant was employed by a restaurant at the time of his injury, and was injured while performing duties aboard a floating restaurant. This would be true if the Mike Fink Restaurant was not part of a broader employing enterprise that gives rise to other dual, joint or single employer/employee considerations.

It is my conclusion that Congress left little room in the statutory language of Section 2(3)(B) that would permit benefits to be paid to any individuals employed solely by a "restaurant" under the Act, regardless of the traditional maritime duties being performed by them.

2. Effect of House and Senate Committee Reports on the Section 2(3)(B) Exclusions

While the first of the two House reports on the new amendments does appear to leave room for such coverage, the second one does not appear to accomplish it, and the Senate Report confirms this conclusion.

A review of House Report 98-570 (I) dated February 7, 1984, and the House Conference Report 98-1027 dated September 14, 1984, do shed some light on the final disposition of Public Law 98-426, the Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639. The Senate Report appears in the September 20, 1998 Congressional Record, pp. 26296-303.

The February 7, 1984 House Report, under the section regarding definition, jurisdiction and the coverage on page 23, shows that Section 2 of the bill amends Section 2 of the Longshore Act, "Definitions" and the term "employee," to exclude from that term,

> certain categories of workers who are not engaged in maritime occupations or who are not exposed to maritime hazards even though they may be employed by maritime employers; or individuals who are employed by enterprises which are not generally viewed as maritime employers although located on, or adjacent to navigable waters, and who are not otherwise exposed to maritime hazards.

In the report's first example, it cites § 2(A) excluding "clerical, secretarial, security or data processing work." As stated above, that amendment inserted the word "exclusively", and modifies all four classifications of work presented, noting that a stevedore who did some clerical work would not be affected. Also, others that are doing office clerical work but other types of such work as cargo checkers would also not be affected.

The report then went on to point out that:

> [s]imilarly the exclusions from the definition of 'employee' found in paragraphs 2(3)(B) and (C) of the Act, as amended, should in the opinion of the committee, be narrowly construed. These paragraphs exclude employees because of the nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing. (Emphasis added)

It goes on to explain however, that:

> Section 2(3)(B) would exclude from the definition of 'employee' all employees of clubs, camps or recreational operations. (Emphasis added)

While expanding on the term "club" which would not be a "club" if it was engaged in substantial commercial operations and therefore not included in it,

> the committee believes, however, that some enterprises which are provided with exclusions under § 2(3)(B) and (C) because of the nature of the employing enterprise may, in fact, employ workers who should remain covered by the Act because of the nature of the work which they do or the nature of the hazards to which they are exposed. Such employee should remain covered by the Act and the committee has so provided in § 2(3)(C) that employers of such employees who are engaged in construction, replacement or expansion of such facilities (except for routine maintenance) continued to be covered by this Act . . .. (Emphasis added)

It was limited to such "routine maintenance," as tasks such as, "sweeping, cleaning, trash removal, housekeeping and small repairs."

It is clear from the testimony of the employer's witnesses in the present case, that this is precisely what it was attempting to do with the Claimant, that is, try to establish that his work was limited to: "sweeping, cleaning, trash removal, housekeeping and small repairs." However, this testimony is belied by three things: 1) the object of the "transfer," given the nature of the training that he had received as a dock hand in the entire Bernstein's enterprise before his move that he brought to the Mike Fink Restaurant as a Harbor Master, and which was closely observed for his entire first week there to see that it was not wasted; 2) the lack of any evidence that he was told to limit his work in this way; and 3) the fact that he was moved, and by his own testimony, continued to perform major hazardous tasks in addition to other minor tasks that might have been assigned to him for the Mike Fink Restaurant. Again, I credit the Claimant's testimony regarding the work that he actually performed which time and again exceeded that of any small repairs or light maintenance, sometimes including construction, replacement or expansion of the Mike Fink's facility. The conference committee itself stated:

> At the other end of the spectrum and clearly not included in 'routine maintenance' is such work as construction in new buildings or additions to existing structures, excavation, and work which involves the use of heavy equipment.

I consider the use of welding equipment and preparation for the use of welding equipment, the movement of barges and docks, and the addition of barges which Claimant testified to, to expand the docks, in which I also credit, to be the kind of work that would not have been subject to this proposed exception to the exclusion, under this committee comment.

Likewise, however, subsection (C) contained the exclusion of "individuals employed by a marina and who are not engaged in the construction, replacement or expansion of such marina (expect for routine maintenance)." It is noted that the specific language regarding construction, replacement, etc. is not included as an exception to the subparagraph (B) exclusions. Even though I do not consider movement of the entire dock to be routine maintenance, nor, particularly on the night of his accident, do I consider it to have been solely for the benefit of the Mike Fink's Restaurant, that activity was not excepted from the final 2(3)(B) restaurant exclusion. However, as will be seen in the next section of this decision, it did benefit the entire Bernstein/Benson's enterprise, which will be considered as a separate matter involving single enterprise employment.

The House Conference Report of September 14, 1984 recounts that the Senate bill had added to the express exemptions contained in Section 2 of the Act: "1) employees exclusively performing office clerical, secretarial, security or data processing work; 2) club, camp, restaurant, museum, retail outlet and marina personnel; 3) personnel of suppliers, transporters or vendors temporarily doing business with covered employers; 4) aquaculture workers; 5) certain personnel employed in specified grain elevator loading operations; and 6) persons engaged in the construction or repair of recreational vessels under 65 feet in length and certain shipbuilding and ship repairmen building specified barges and vessels," all of which were subject to coverage under a state workers compensation law, and most of which remained in the final version of the bill. It is also noted that the bill specifically exempted the following employers: 1) clubs, camps, restaurants, museums, retail outlets, and marinas; 2) aquaculture farms; and 3) builders or repairers of certain small vessels. The House Amendment generally followed the Senate bill, but attempts to provide further qualifications; namely: "individuals employed by a restaurant, museum, retail outlet or marina are exempt if they do not engage in construction, replacement or expansion of such facilities with an exception being made for routine maintenance work." That construction exception to the exemptions did not make it into the final bill.

More particularly, the conference committee substitute exempted the following individuals from coverage under the Act (by excluding them from the definition of employee in Section 2(3)):

> 1) individuals employed exclusively to perform office clerical, secretarial, security or data processing work; 2) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet; 3) individuals employed by a marina who are not engaged in construction, etc. . . . (except for routine

> maintenace); 4) individuals who (A) are employed by suppliers, transporters or vendors, (B) are temporarily doing business on the premises of a covered employer, and (C) are not engaged in work normally performed by employees of that employer under this Act; 5) aquaculture workers; and 6) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length.

All were conditioned upon the individual being subjected to coverage under state workers compensation laws.

In developing the conference substitute, the conferees noted that they had "reached certain understandings regarding the new exemptions." The conference committee observed that in each house, there was identical language for exempting individuals employed exclusively to perform clerical, secretarial, security or data processing work," reflecting that, "these individuals are land-based workers otherwise covered under a state workers compensation law and their duties are performed in an office." It further noted that this "substitute does not exempt employees classified as longshore cargo checkers and clerks." It again discussed the "club employees' exemption stating that neither the Senate bill nor the language of the House amendment recognized the distinction between profit and non-profit clubs, which the House had attempted to do. It discussed the "aquaculture" employee exclusion and its traditional meaning with regard to "cleaning, processing or canning of fish and fish products," without necessity for additional language to the statutory language. It mentions an exemption of employees employed by facilities engaged in the business of "building, repairing or dismantling exclusively small vessels," but no mention is specifically made with regard to such a limitation to the provisions of § 2(3)(B) nor are any of the other comments from the prior House report restated.

From the September 20, 1984 Senate report, the committee of conference on the disagreeing votes of the two Houses on amendment of the House to the bill (S 38)," on the final version of the bill, Senator Nickles stated at two places:

> [T]he bill carves out certain categories of workers and specifically excludes them from the definition of "employees" covered under Longshore. 1984 Congressional Record, 2d Sess. 26-296

and,

> [T]he committee fell back on what was potentially feasible, namely singling out several specific categories of occupations and activities for exemption. If there is a common thread running through the changes, it is probably the belief that these activities and occupations either lack a substantial nexsus to maritime navigation and commerce or do not expose employees to the type of hazards normally associated with longshoring, shipbuilding, and harbor work. (Id. at 26-298)

Interestingly, in an attempt to show the limitation of the amendments, the conference committee noted that it was not expanding the coverage of the Act, including employers not usually included, stating,

> [I]t is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed. (Ibid)

The exemptions were clearly premised on coverage by State Workmens' Compensation Programs for those so excluded. (Ibid)

It is my conclusion from this discussion of the history of the reports, that neither the kind of "exclusivity" language contained in § 2(3)(A) regarding "clerical" employees, nor the qualification to "marina" employees involving construction, replacement or expansion of such marina (except for routine maintenance) appear in paragraph (B). This subsection excludes all employees of restaurants standing alone as such restaurants, without the involvement of any other employers in the employment of such employees. The final House report may have intended to carry the "construction" limitation forward from the first report, but the language had changed, with the construction exception applied only to the (2)(3)(C) "marina" employees only. This is the final position of the September 20, 1984 conference committee report, and the clear exclusionary language of the statute.

Therefore, I agree that if the Mike Fink Restaurant is viewed solely as an entity all by itself, and the Claimant was an individual employed solely by that entity, he would be excluded under the broad language of Section 2(3)(B). However, the language of § 2(3)(B) did not address individuals who were employed simultaneously by more than one employer in either a "dual," "borrowed," "lent," "joint" or "single" employment status, by a multiple employer enterprise, and as will be seen below, Claimant was, in fact, employed by more than the Mike Fink Restaurant, with at least the status as a "dual" employee, and/or the employee of "joint" or even a "single" employer. Because of that fact, jurisdiction over his claim as an "employer" may still be asserted and benefits may still be recovered.[7]

B. " Dual", "Borrowed", "Lent", "Joint" or "Single" Employer Employment by a Section 2(3)(B) Employer and Another Maritime Employer:

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[7] Does the scope of the term "marina" employees cover the kind of limited pleasure boat docking that took place at the Mike Fink Restaurant? I think not. If the docking of the Beverly Wayne made it so, then perhaps "yes"; but there has been no such contention made and it is my opinion that its "marina" function was only incidental to the Benson's B B Riverboat/Mike Fink's business enterprise. It is my opinion that the Mike Fink Restaurant dock was not a "marina" under § 2(3)(C) of that Act.

(a) Common Law Principles Affecting Workers Compensation Law

General principles of master/servant as developed in the common law have frequently been invoked to determine whether otherwise uncovered employees of certain employers would be entitled to benefits by virtual or simultaneous employment relationship with other covered employers (1B A. **Larson's Workmen's Compensation Law**, § 48.00 et seq.)

In the one of the first cases reviewed by the Benefits Review Board, Ronan v. Maret School, Inc., 1 BRBS 348 (1975), aff'd mem., 527 F.2d 1386 1386 (D.C. Cir. 1976), the Board upheld the Administrative Law Judge's conclusion that the Claimant was an "employee." In so doing it upheld his reference to the Restatement (Second) of Agency, § 220, Subsection 2 which summarizes those common law principles to be:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, which reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d. The skill required in the particular occupation;
e. Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and servant, and
j. Whether the principal is or is not in business.

The Board further recognized the statement in the Comment "c" to Subsection 2 of the Restatement, which states:

c. "Generality of definition. * * * The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.

The Board quoted the Ronan decision and its incorporation of the Section 220, Restatement of Agency Tests, where there was an employer-employee relationship with the two alleged "dual employers" in that case, citing also 1A, **Larson's Workmen's Compensation Law**, § 48.50 to verify the dual employment status of Mr. Hanson with the two companies involved in that case, aff'd, sub nom, Charles Hanson v. Oilfield Safety, Inc., et al., 8 BRBS 835, 839-840

(1978), Oilfield Safety & Mach. Specialties v. Harman Unlimited, 625 F.2d 1248 (5th Cir. 1980), citing Lance v. Hut Neckwear Co., 118 N.Y.S. 2d 327 (1952); cf., Carr v. Earl H. Mitchell, M.D., 5 BRBS 772 (1977). See also Martin v. Kaiser Co., 24 BRBS 112, 120 (1990).

In a later case, George M. Edwards v. Willamette Western Corporation, et al., 13 BRBS 800 (1981), the Board split over whether the Administrative Law Judge had absolutely accepted the test in 1(B)(A), **Larsons Workmen's Compensation Law**, § 48.40, defining "joint employment." Section 48.40 states:

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously perfom services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other period. In such a case, both employers are liable for workmen's compensation.

The majority and minority in the Edwards decision did not differ over the fact that that test could be adopted by the Administrative Law Judge in making a "dual" employment determination. (13 BRBS 804, 809) The Board majority found the Administrative Law Judge's analysis of the factors regarding employment relating to each of the two claimed employers and resulting in a finding of "sufficient contacts" with them both, to not be "considered an application of a reasonable test." It remanded the decision to the ALJ directing that he adopt a specific test; either the "sufficient contacts" test or the **Larsons** "§ 48.40" test, or any other "appropriate test for imposing liability in a borrowed employee fact situation." Id. at 806.[8]

Section 48.43 of **Larsons** states:

> Joint employment may also be found when workers perform for affiliated or closely related corporations or businesses.

The only federal case cited thereunder is Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir.1987) which involved a plane crash and the death of an employee in a plane owned and operated by a wholly owned subsidiary of the employer. The surviving spouse sued the subsidiary and other entities. The subsidiary contended that it was nothing more than the alter ego of the parent corporation which was the employer of the deceased, and should be able to share its employer immunity from civil suit under the Workers Compensation laws. In that case, the court adopted the "right to control test" as set forth in the Restatement of Agency, Section 220, above

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[8] The Board found that "[T]he Claimant . . . injured his lower back and neck while working on board the crane barge, Volcan, owned by Willamette . . .. The crane and certain non-supervisory Willamette personnel, including the Claimant, had been rented by Willamette to R. A. Heintz Construction Company . . . to perform drudging operations under the contract with the United States Army Corp of Engineers." Id. at 801. The claims were filed against Willamette and Heintz and their insurance companies.

but held there was sufficient evidence for the jury to determine that the two corporations were separate businesses and the employees of one were not employees of the other. The court allowed by a substantial verdict in the favor of the wife to stand.

Other state cases clearly define the relationship. See Duff v. Southern Railway Co., 496 So. 2d 760 (Ala. 1986), where a the Federal Employers Liability Act (FELA) claim was brought against Southern Railway when Duff was injured while working for Lenoir Car Works, Inc. Lenoir was formerly a subsidiary of Southern, which the Claimant alleged was the alter ego of Southern. Summary judgment was granted to Southern dismissing it, but that decision was reversed on appeal since the following factors were determined to be sufficient to create issues of fact: 1) that Southern owned all the stock in Lenoir, 2) an officer of Southern was also a director of Lenoir, 3) Southern paid the salaries of the employees of Lenoir, and 4) Southern purchased over 99 percent of Lenoir's business. See also Hartford Accident and Indemnity Co. v. Travelers Insurance Co., 523 S.W. 2d 612 (Mo. Ct. App. 1975).

(b) Factual Analysis of Common Law Principles

The Claimant enjoys a unique status in his employment for Mike Fink Restaurant. He is the only individual employed by it that had traditional maritime duties as shown by the evidence. Mike Fink's is a wholly owned subsidiary of Benson's, Inc. As noted above, Bensons, Inc. and Mike Fink, Inc. have the same corporate officers (James Bernstein, President, Mrs. Bernstein, Secretary/ Treasurer, and David E. (nickname: "Allen") Bernstein, Vice-President). Allen Bernstein stated that Bensons, Inc. is the parent company, that "Ben" was his father, and that the "sons" in "Benson's" were his brother Jim and himself. There are "other companies" under the 'Benson's umbrella: Mike Fink's, B B Riverboats, Crockett's (now Sloppy Joe's) and two or three Chuck E Cheese's. El Greckos was part of the enterprise but no is longer in existence. They are also the same officers for the other corporations, i.e., Jim is President of B B Riverboats, Bensons, Inc., Allen is the Vice President, and Mr. Harghlin is the treasurer; and his mother holds the position of Secretary. All are paid by Bensons, Inc. The checks for all purposes come from the corporate office of Benson's which has an individual account number for each of the subsidiary corporations. In other words, all of the corporations inolved under the umbrella of Bensons, Inc., are owned and operated primarily by the Bernstein family. Claimant testified that he was taking his "marine orders" from B B Riverboats Captain Rizzo on a day to day basis, and that his employer he believed to be was Bensons, Inc. even though he had been assigned to General Manager, Tim Shaughnessy of the Mike Fink's. Mr. Shaughnessy did administratively supervise Claimant's employee actions such as vacation approval and signing W-2 forms, but there is no direct evidence that he supervised any of the Claimant's dock work.

For the following reasons, I credit the testimony of Claimant, Huff, and give it greater weight than the otherwise credible testimony of Vice President Bernstein and Captain Rizzo. In so doing, I am cognizant of the fact that the Claimant was trying to maximize his relationship with Benson's and B B Riverboats, and that the others were trying to minimize it within certain legal limitations. Claimant was forthright in his testimony. He had consistently good demeanor and

was consistent throughout that testimony concerning the work that he described. Important to this determination, he has done most of that work alone, and is the only person that can accurately describe what he has actually been doing on a day to day basis.

Due to his continuing relationship with the Benson's and B B Riverboats, he did not require much supervision. That does not diminish the relationship with Benson's or B B, it enhances it. As an integral part of the Benson's/B B enterprise, much was expected of Claimant Huff. When excess traffic crowded the B B docks, it was sent over to the Mike Fink Restaurant docks automatically, knowing the Claimant would secure the vessels and that he would watch over them to be certain that they were moored, that electric connections were maintained, that the sub pumps were operating and that the vessels did not sink. While Mr. Huff's work performance and personal life appeared to be at a low point at the time of his transfer from Benson's to Mike Fink's, there was no doubt about his ability to do the work there and there was not one word of criticism on the record about his work performance after that transfer. Again, because of his day to day description of it, and the infrequent visits of Mr. Bernstein or Captain Rizzo (and virtually no evidence of any supervision by Mr. Shaughnessy), I give the Claimant's testimony greater weight in this evaluation.

In May of 1995, the Claimant was "transferred" to the Mike Fink Restaurant by a Benson's bookkeeping entry. It is significant that this move was made following the death of Mike Fink's, Harbor Master, Denck Shallow, on the expression by Claimant of his lack of job mobility opportunities at B B Riverboats and that the move came from the Benson's enterprise rather than the application process from the Mike Fink Restaurant. It is clear that the personnel action was considered a transfer rather than a termination of employment by R R Riverboats and the rehiring by Mike Fink's. It demonstrates the control that the Benson's had over the entire operation and the relationship of this particular employee to the rest of the enterprise.

When the Claimant was assigned to the Mike Fink Restaurant, he was technically under its general manager, Tim Shaughnessy. However, it was confirmed by Mr. Bernstein and Mr. Rizzo that Shaughnessy knew nothing about the river boat and maritime operations and that whenever the Claimant needed such infomation, he would go to them or even other employees of B B Riverboats for the kinds of information in that regard.

Mr. Bernstein confirmed that Claimant, following his move, did maintenance work as part of his job including work on the docks at Mike Fink Restaurant and any repair work that had to be done falling under his job description. His job included changing of the tires and carpets on the docks, which Mr. Bernstein claimed was a "minimal part of the job and not the vast majority." Both Mr. Bernstein and Mr. Rizzo confirmed that they were not with the Claimant 100 percent of the time and were not familiar with all the duties that he was performing on a day to day basis.

As the Claimant confirmed, the Shirley B, the crane barge, and the Mary B often dock at the Fink docks and he would be responsible for checking them, making sure they did not sink and that they were tied off properly. This would be the same for the Covington Police boats tied at

the dock and other boats. There have been occasions when Mr. Huff had been called down to assist at the B B Riverboats and Sloppy Joe's. Claimant was originally hired by Benson's and assigned to B B Riverboats where he worked for Captain Rizzo as well as Mr. Bernstein. He worked as a dock hand there and later as dock master for Mike Fink Restaurant while working B B.

It is apparent to the undersigned with the number of dockings that occurred on a regular basis (at least one per week) by the Shirley B, the crane barge, the Mary B and other dockings at Mike Fink's, that the docking operation of the Mike Fink Restaurant of which the Mike Fink's vessel was the anchor, was an integral part of the Benson's river operations. (The 160 foot boat and 200 feet of dock space all move as one unit.) Both Mr. Bernstein and Mr. Rizzo confirmed that whenever there was not room at the other location for the B B or for other of their boats, they would move them to the Mike Fink's docks.

The docks remain open year round. In the summer time, they are used for pleasure craft, but there are times of the year from October to March when there are no pleasure boaters at all. They are a "catch all" for the Shirley B, the crane barge, the Mary B, the Kon-Tiki, the Beverly Wayne which was owned by David Hammond of Carlisle Riverboats, or any barge that they want to move up river throughout the year. As Harbor Master, Claimant was "supervisor" of the dock. He was expected to service any boat that docked there; to make sure that it was safely moored, and to be certain that it did not sink!

While Mr. Bernstein contended that the Claimant was not part of the emergency team, Mr. Huff testified, and I credit his testimony in this regard, that he continued to engage in emergency operations as a representative of the Benson's enterprise. There is no objective evidence in the record that Claimant was ever told that he was no longer on the emergency response team and, in fact, he continued to have a beeper and be called for emergencies both on and off the Mike Fink Restaurant. The fact that he was technically an employee for paperwork purposes of the restaurant did not change this fact. It was one of the many circumstances where he continued to operate in the same manner as he had operated before his transfer to Mike Fink Restaurant.

The Beverly Wayne, which was docked at Mike Fink's for a long time, appears to have been converted to a pleasure craft for Mr. Hammond of Carlisle River Boats, a friend and business associate of the Bernsteins, but remained on call for miscellaneous and emergency duty. It had two working wenches on the front of it that were used to "blow" drift from around the Mike Fink's dock areas as well as for other purposes on an emergency basis. On one occasion, the Claimant went with Mr. Hammond to pick up a barge flat that had broken loose from another location and brought it back to the Mike Fink's and tied it off. It was later picked up by one of Carlisle's boats. Claimant was expected to be sure that the Beverly Wayne was moored properly; that it was not taking water, that it was heated, and that it had running water. He would check it out on a regular basis, just as he would other craft that was docked at the Mike Fink's docks.

Claimant's testimony, which I credit, is that he did a lot of work with the Shirley B; that he would bring supplies on to the Shirley B and the crane barge, and equipment such as acetylene tanks and equipment and gas. A crane operator was held to be covered whose "marine" work constituted 1 ½ - 3 percent of his entire workload in Lewis v. Sunnen Crane Service, Inc., 31 BRBS 34 (1997).[9] He stated that he would repair the docks of the Mike Fink's, take sheet metal off the Shirley B or crane flats, and occasionally grind a spot off for the welders. Sometimes he even did the welding himself. He was also called over to the B B Riverboat to do painting and things of that nature, and would help the crane barges to "get tooled up or supplied up." There is no testimony that the Claimant was told that he had to maintain a separation in the work that he was to do between the various Benson's companies.

On one occasion, Captain Allen Rizzo had called to tell him that the painters had not shown up and that he was to take the painter's position and do work there at B B Riverboat when the boat was down. On another, Mr. Bernstein, on one of his frequent lunch visits also commented on the painting of Mike Fink's and directed changes.

Claimant testified that he was called by B B Riverboat to assist at Crockett's when a tarp had blown off and he had gone to Hooter's with them as part of the emergency response team with the crane flat and the Shirley B to help there. When the City of Cincinnati's dock got loose, he was with Captain Willhoite and the B B Riverboat captain when they had called for additional help from the Shirley B when the barges got away.

When the Shirley B was gone, the crane barge would stay at Mike Fink's for days until it returned. It would part of his harbor duties to look after it as has otherwise been described herein.

When the Claimant's accident took place at 2:30 in the morning on March 16, 1995, and he was adjusting the entire Mike Fink Restaurant and the docks due to the changing height of the river, he was performing a service not only for Mike Fink's but for the entire Benson's operation which was important to that entire operation.

When the Claimant fell, he was performing duties that are among those considered most hazardous in the longshore industry. At a six degree temperature and a wind chill factor of zero degrees, he was climbing on the platform to adjust the height of the docks and the restaurant to the river and fell backwards towards the propane tanks. While looking for a place to put his foot, he ended up suspended between the propane tanks, hit his head on the platform on the way down, and tried to catch himself. When he was knocked out and came to with the chain pull wrapping around him, he stayed for approximately five hours until someone else came to rescue him.

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[9] Virtually any amount of longshoring operation activity qualifies to determine that an employee is an "maritime" employee. Northeast Marine Terminal Co., Inc. v. Carpenter, 432 U.S. 249 (1977).

While the right to control Claimant's employment appears obvious by implication, his relative independence as a Harbor Master on a day to day basis, and his lack of contact with Mr. Bernstein and with Mr. Rizzo, may be questioned on a rigid application of the "right to control" test as stated in the Restatement. However, when the concept of "single employer" is examined, the relationship to Claimant's employment status becomes manifest.

2. Joint vs. Single Employer Status

(a) Summary of Case Law Under the NLRA

The review of the "dual", "borrowed", "lent" and "joint" employee cases set forth in § 48 by **Larson's** usually involve cases where the injured employee has no workers compensation coverage under the employer with whom he has the closest association and he is seeking benefits from another covered employer or business with whom there has been some relationship during the performance of his duties. Here, the company with whom the Claimant has the closest relationship, Mike Fink Restaurant, carries Kentucky Workmens' Compensation insurance but, is excluded under Section 2(3)(B) under the federal statute and the Claimant seeks insurance under the broader federal scheme for longshoremen through the close relationship of the two or more businesses of Benson's, B B Riverboats and Mike Fink Restaurant. In the Hanson and Edwards cases cited above, the administrative law judges examined the employment contractual relationships with two or more companies finding such relationships with both otherwise unrelated employers. In Edwards, the judge had found the Claimant to have had a contractual relationship with two unrelated employers but the Board majority remanded it for failing to specifically enunciate an appropriate test governing the analysis of the respective relationships, much to the shagrin of the dissenting board member.

In the search for an appropriate test other than the "sufficient contacts" test, or the **Larson's** § 48 test, discussed by the Board in Edwards, National Labor Relations Board (NLRB) authority was not mentioned but should be considered. This is especially the case when the relationship of a primary employer such as the Mike Fink Restaurant, is as close as it is to the secondary employers, Bensons, Inc. and B B Riverboats.

Frequently, the NLRB must untangle intricate employment relationships between employers and employees, and the labor organization that represent those employees or seek to represent the employees under the National Labor Relations Act, as amended (NLRA), 29 U.S.C. § 151, et seq.. In their determinations, and in their review of NLRB decisions by the United States Supreme Court and Courts of Appeal, they provide a significant body of precedent which should be given consideration in these determinations. Multiple business employer/employee issues are raised frequently in these cases.

While the basic definitions of "employee" differ to accommodate the purposes of the NLRA and other employment statutes such as the present Act[10], an analysis of the common law elements of control by the employer of the alleged employee continues to be necessary to determine his or her legal status under both statutes. In both, examination of the extent of control over the matter and means of the work performed by the individual is analyzed to establish the nature of the relationship. In so doing, a direct line is established to the common law principles set forth above in the Restatement of Agency, Second, and NLRB's determinations provide a significant law for consideration in the present case.

As may be seen in Deaton Truck Line, 143 NRLB 1372, 53 LRRM 1497, 1499 (1963), appealed, dismissed, sub non. Teamsters Local 612 v. NLRB, 1337 F.2d. 697 (5th Cir. 1964), *cert denied*, 381 U.S. 903 (1965), the NLRB stated that an employer-employee relationship exists, "where the person for whom the services are performed, reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end." There may be other elements involved such as withholding of income taxes (Frederick O. Glass, 135 NLRB 217, 49 LRRM 1477 (1962), enforced in part, 317 F.2d 726 (6th Cir. 1963) (which in the present case I conclude are withheld by Benson's, since its payroll department performs the payroll functions for Mike Fink's employees) and also to be considered is whether the agreement and conditions of employment were arrived at through negotiations or imposed by the alleged employer. Mohigan Trucking Co., 131 NLRB 1174, 48 LRRM 1213 (1961). (Here I conclude that the terms and conditions of Claimant's employment at the Mike Fink Restaurant were set by Benson's, and in fact, the Claimant was observed by Benson's for a week after his transfer, to determine the effect on Benson's operation. Involvement by Mr. Shaughnessy in these discussions is not even mentioned)

Often the NLRB is required to determine who the employer is since multiple business entities are doing business together and may constitute a "joint" or "single" or one employer for purposes of the NLRA, for representation or other purposes, i.e., Parkline Hosiery Co., 203 NLRB 597, 612, 83 LRRM 1630 (1973), where an arms length relationship is found not to exist. There are four factors that the NLRB examines to determine whether or not multiple companies should be treated as a single employer: 1) inter-relation of operations; 2) common management; 3) centralized control over labor relations; and 4) ownership or financial control. (Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, 380 U.S. 255 (1965))

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[10] Section 2(3)(B) of the present Act at page 16, supra, and the National Labor Relations Act definition at § 2(2) thereof, (29 U.S. Code § 152(2)) which defines "employee" as including, "any person acting as an agent of an employer, directly or indirectly, but shall not include . . . " [the exclusions which follow.]

In Browning - Ferris Industries of Pennsylvania v. NLRB, 691 F.2d 1117, 1122-24 (3rd Cir. 1982), a frequently cited case, the Third Circuit summarized the standard for recognizing the differences between "joint employers" and "single employers" utilizing the four tests.[11] It recognized the two concepts as "distinct," but acknowledged a "blurring" of the two. Citing Boire v. Greyhound Corp., 376 U.S. 473, 84 S.Ct. 894, 11 L. Ed. 2d 849 (1964) and Radio and Television Broadcast Technicians, supra, the Third Circuit then relied upon the latter to acknowledge the distinction and stated:

> [A] "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that for all purposes there is, in fact, only a "single employer," the question being, "whether the two nominally independent enterprises in reality, constitute only one integrated enterprise."

(691 F.2d 1122-24)

To reach this conclusion, the court must consider the above four factors. It concluded that:

> "[s]ingle employer" status ultimately depends on all the circumstances of the case and is characterized as an absence of an "arms length relationship found among unintegrated companies." (Ibid. Citations omitted)

It contrasted this "single employer" standard with the "joint employer" concept, which does not depend upon the "existence of a single integrated enterprise," and "assumes in the first instance that the companies are 'what they appear to be' - independent legal entities that have merely 'historically choosen to handle jointly ... an important aspect of their employer-employee relationship.'" (Ibid)

In the Sixth Circuit decision in NLRB v. Checker Cab Co., 367 F.2d 262, 698 (6th Cir. 1966), the court concluded that:

> in the 'joint employer' situations no finding of a lack of arms length transaction or unity of control or ownership, as required, as in single employer cases.

The court restated the " joint employer" standard to be applied as follows:

> [W]here two or more employers excert significant control over the same employees - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment - they constitute "joint employers" within the meaning of the NLRA, citing Boire v. Greyhound Corp., supra.

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[11] See full discussion in Hardin, **The Developing Labor Law**, 3rd ed., 1599 and the 1997 Cumulative Supplement thereto 572 (1997).

That "joint employer" standard has not only been recently reiterated by the Sixth Circuit in Carrier Corporation v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985), an NLRA decision, but also in a combined Age Discrimination and Employment Act 29 U.S.C. § 621, et seq., and Americans with Disabilities Act case, 42 U.S.C. § 2101, et seq., in Swallows v. Barns & Noble Book Store, Inc., 128 F.3d 990, 993. Citing both Carrier and Browning - Ferris as well as a Sixth Circuit forerunner to Carrier in York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360 (6th Cir. 1982), that court stated:

> in determining whether to treat two entities as a single employer, the court examined the following four factors: 1) inter-relation of operations, i.e., common offices, common recordkeeping, shared bank accounts and equipment; 2) common management, common directors and boards; 3) centralized control of labor relations and personnel; and 4) common ownership and financial control.

(128 F.3d 994)

It went on to state that, "none of these factors is conclusive, and all four need not be met in every case."

What this indicates is that there is a clear federal standard that has emerged, affecting all federal employment case law when an issue is presented regarding multiple business enterprises and the definition of employee in attempting to examine the existing employer-employee relationship. In determining whether to treat two entities as "single employer," the administrative law judge must examine the following four factors: 1) the inter-relationship of operations, i.e., common offices, common recordkeeping, shared bank accounts and equipment; 2) common management, common directors and boards; 3) centralized control of labor relations and personnel; and 4) common ownership and financial control. These factors are conclusive and all four need not be met in every case, but all four must be examined. That NLRB standard for determining whether an employer is a "joint employer" or a "single employer" is hereby adopted in the present case.

(b) Analysis of the Facts Applying the Federal "Joint Employer" - "Single Employer" Standard

When the present facts are placed under a microscope, pursuant to the NLRB standard adopted above, it is clear that for purposes of the employment of Claimant, James E. Huff, that the Benson's, Inc. enterprises, consisting of Benson's, B B Riverboat, Mike Fink Restaurant, and the other related Benson's corporations, constitute a single enterprise and a single employer within the meaning of that standard.

1) Inter-relationships of operations

The Mike Fink Restaurant's office for purposes of its financial recordkeeping and operations is the Benson's office. Testimony is that the payroll records are maintained at that location and that the checks are issued from the point. The fact that Claimant's W-2 form contained Mike Fink's address does not change the weight of the evidence on this point. At the most, there is a single subsidiary accounting number that is issued for Mike Fink Restaurant and although it is acknowledged that W-2 forms issue in the name of Mike Fink Restaurant, all of the preparation of payroll and related activity takes place at Benson's. The bank account from which the money comes from for these purposes also are Benson's bank accounts. The equipment that is utilized within that office is commonly used by the Mike Fink's enterprise regardless of what other equipment may be maintained at the Mike Fink Restaurant. In addition, it is clear that Benson's considered the Mike Fink docks as part and parcel of its own operations, and sent riverboats there whenever deemed necessary, for as long as was deemed necessary.

2) Common Management, Common Directors and Boards

The testimony was that, as stated above, the shares of stock were held by the Bernsteins; that they served in the same offices for all of the corporations - President (James Bernstein), Vice President (David "Allen" Bernstein) and Secretary (Mrs. Bernstein) and Treasurer (Mr. Harghlin); that Mr. Bernstein gave directions for them and that the Claimant received directions at Mike Fink's as well as the other locations from both Captain Rizzo and Mr. Bernstein. (Whether they intended to do this as may be indicated by their testimony, is irrelevant because, in fact, crediting the testimony of the Claimant, those directions continued.) Mr. Shaughnessy, as the manager of Mike Fink Restaurant, may have had certain authority with regard to the restaurant itself, but the fact is that he knew nothing about the river or the marine operations on the river and there was evidence of very little supervision in those affairs and, actually, no evidence factually of any supervision on the river. Mr. Bernstein testified that the Claimant would do certain things after he (Mr. Bernstein) had discussed them with Mr. Shaughnessy. Mr. Shaughnessy did not testify and there is no evidence that Mr. Shaughnessy was appearing on the docks or giving any kind of instructions to the Claimant on a day to day basis which, in effect, verifies Claimant's version of how he operated on the docks. In addition, Mr. Bernstein was, as an officer of the company, in fact, Mr. Shaughnessy's "boss" and ultimately responsible for the operation together with James Bernstein and Mrs. Bernstein. There is no evidence of any other intervening supervisory or managerial authority between Mr. Shaughnessy and the Bernsteins.

3) Centralized Control of Labor Relations and Personnel

Here, the above discussion is incorporated. There may be a dichotomy between Claimant, as Harbor Master, and the other employees of the respondent which must be limited to the evidence that is in the record. Claimant's move from B B Riverboat to Mike Fink Restaurant was characterized by Benson's as a "transfer," and the statement by Mr. Bernstein regarding the evaluation of his first week at the Mike Fink's operation clearly shows that they were measuring

its effect on the Benson's operation with the clear implication that if it did not work out he would be transferred back to B B Riverboat. The fact is that this statement clearly demonstrates the ultimate control over Claimant by the Bernsteins and the intended continuance of that control. The fact that he was receiving his check from Benson's and had to report there for certain payroll and administrative matters also demonstrated the continuing control. The prior discussion in 2) demonstrates the centralized control of labor relations.

In making this determination concerning Claimant, Huff, I want to note that there is insufficient evidence on the record to make a determination with regard to the balance of the restaurant workers who worked for Mr. Shaughnessy in the traditional restaurant capacities such as cooks, waiters, salad employees, and bus employees, etc. Therefore, I make no determination as to the centralization of control of labor relations and personnel with regard these individuals.

4) Common Ownership and Financial Control

As indicated above with regard to the common offices and recordkeeping, the stock ownership was shared by the Bernsteins in Benson's, B B Riverboats, Mike Fink's and all related corporations, and the clear financial control of all the different corporations in the enterprise is demonstrated by the fact that Mr. Bernstein did the bookwork. Since none of these factors is conclusive and all four need not be met in every case, there is sufficient financial control of Claimant's day to day activities on the docks by the Bernstein's and Captain Rizzo to determine that at least part of the labor relations policy concerning Mr. Huff. Control of it was ultimately in the hands of the Bernsteins. It is not necessary that I find that there was a similar labor relations control over the other restaurant employees to "lift" the exclusion that Mr. Huff as Harbor Master might otherwise have had based upon the facts of this case.

Applying the Browning - Ferris standard, the Seventh Circuit in NLRB v. International Measurement & Control Co., 978 F.2d 334 (7th Cir. 1992), enforced an NLRB order requiring three corporations and two partnerships to pay as a single employer which unlawfully discharged employees since members of the same family owned all of the entities, labor relations authority over employees was shared by family members, and the businesses were integrated. The court found a no "arms length" relationship among them and determined that a single employer relationship was warranted.

Likewise, I find, in applying the four tests to the above stated facts that the Benson's enterprise consisting of Bensons, Inc., B B Riverboat and Mike Fink Restaurant constituted a single integrated enterprise with common ownership and financial control by the same family who held all of the key offices in the corporation and positions of ultimate control of both financial and labor policy on a day to day basis. Mr. Bernstein maintained a constant presence at one or the other of the operations, Mrs. Bernstein actually maintained the day to day financial payroll records. In International Measurement & Control Co., it was the same family that maintained this common ownership and financial control indicating their "hands on" clear authority over all employees in the operation. It is an integrated enterprise for purposes of the relationship with Mr.

Huff as Harbor Master. There is no "arms length" relationship in terms of the labor relations control that is exercised on a day to day basis. A "single employer" relationship determination is therefore warranted.

It is my conclusion in light of all the facts and circumstances of this case, that the Claimant was an employee not only of Mike Fink Restaurant but of the entire Bernstein enterprise as a "single employer," in particular that of the Bensons, Inc., B B Riverboat and the Mike Fink Restaurant. He was engaged in traditional longshore/harbor work activity in maintaining the docks that were necessary to the entire Bernstein enterprise, and integral to the conduct of its business, and was engaged in that activity at the time of his accident. Therefore, he is a covered employee within the meaning of the § 2(3) of the Act and there is jurisdiction over his claim.

Attorneys Fee:

Claimant has filed a motion for Employer/Carrier paid attorney fees. No memorandum in opposition to the motion has been filed. This notice will be considered as part of the final disposition of the case.

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following order:

ORDER

It is therefore ORDERED that the Claimant, James E. Huff, is a covered employee within the meaning of Section 2(3) of the Act and that jurisdiction is therefore asserted over his claim for benefits.

IT IS SO ORDERED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge